



*STATE OF NEW JERSEY*

*Board of Public Utilities*

*Two Gateway Center*

*Newark, NJ 07102*

*www.bpu.state.nj.us*

IN THE MATTER OF THE PETITION	)	<u>TELECOMMUNICATIONS</u>
FOR THE APPROVAL OF THE TRANSFER	)	
OF CONTROL OF XO COMMUNICATIONS	)	<u>AMENDED ORDER OF APPROVAL</u>
INC., THE SOLE SHAREHOLDER OF XO	)	
JERSEY, INC., PURSUANT TO A	)	
CORPORATE RESTRUCTURING	)	
INVOLVING THE ISSUANCE AND SALE	)	
OF NEW COMMON STOCK	)	DOCKET NO. TM02030160

(SERVICE LIST ATTACHED)

BY THE BOARD:

On October 31, 2002, XO New Jersey, Inc. ("XO New Jersey") and its parent, XO Communications, Inc. ("XO") (collectively, the "Petitioners") filed a Motion seeking amendment of the Order of Approval (the "Initial Order") issued in this docket on August 22, 2002. The Initial Order granted a Petition for Board approval of the transfer of control and ownership of XO, and thus XO New Jersey, pursuant to N.J.S.A. 48:2-51.1. Petitioners' Motion requests that the Board amend its approval in the Initial Order to reflect that a majority of the stock of XO will be owned, not by affiliates of Telefonos de Mexico, S.A. de C.V. ("Telmex") and Forstmann Little & Co. ("Forstmann Little"), but rather by High River Limited Partnership ("High River"), a Delaware limited partnership ultimately controlled by Carl C. Icahn.

BACKGROUND

As set forth in the Initial Order, XO is a publicly held Delaware corporation with principal offices located at 11111 Sunset Hills Road, Reston, Virginia, 20190. Through its operating subsidiaries, XO provides bundled local and long distance as well as dedicated voice and data telecommunications services primarily to business customers. According to the Petitioners, XO has broadband fiber networks in the top 30 cities, and serves 25 of the largest metropolitan areas in the United States. XO is authorized, through its subsidiaries, to provide intrastate interexchange services in approximately 30 states, including New Jersey. On June 17, 2002, XO filed a petition with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), pursuant to Chapter 11 of the United States Bankruptcy Code, seeking temporary protection from claims of creditors while the XO reorganized its operations and restructured its finances. See *In Re XO Communications, Inc.*, Case No. 02-12947 (AJG) (Bankr. S.D.N.Y.). Prior to XO's Bankruptcy, Craig O. McCaw controlled XO through holdings of XO securities and pursuant to various voting arrangements. However, in light of XO's current Debtor-in Possession status, Mr. McCaw's "control" of XO is very limited.

XO New Jersey (previously known as NEXTLINK New Jersey, Inc.) is authorized to provide, facilities-based local exchange and interexchange telecommunications services in the State of

New Jersey. See Order, I/M/O the Petition of NEXTLINK New Jersey Inc for Authorization to provide Facilities-Based Local Exchange and Interexchange Telecommunications Services throughout New Jersey, Docket No. TE98010009 (July 30, 1998).

The Forstmann Little/Telmex Plan approved in the Initial Order was premised on the terms of a Stock Purchase Agreement dated January 15, 2002 ("Purchase Agreement"). The Purchase Agreement required, *inter alia*, a corporate restructuring of XO to eliminate most unsecured debt, to cancel all existing equity and to amend certain terms of XO's secured credit facility. The final piece of the restructuring was to be the purchase of 80% of newly-issued XO common stock by Forstmann Little and Telmex for \$800 million. The remaining 20% would have gone to XO's note holders and management. Although the reorganization of XO according to the Forstmann Little/Telmex Plan was confirmed by the Bankruptcy Court on August 26, 2002, and the Federal Communications Commission granted XO's applications on October 3, 2002, the Motion states that XO, Forstmann Little and Telmex have reached an agreement pursuant to which the Purchase Agreement will be terminated.

The bankruptcy filing developed by XO also contained an alternate reorganization plan, the Stand-Alone Plan. Pursuant to the Stand-Alone Plan, XO – the parent of XO New Jersey – will be reorganized and emerge from bankruptcy ("Reorganized XO"). A majority of the stock of Reorganized XO will be held by High River, a Delaware limited partnership located at 767 Fifth Avenue, Suite 4700, New York, New York 10153. Carl C. Icahn, a United States citizen, ultimately controls and holds almost all of the ownership interests in High River through his ultimate control and ownership of its general and limited partners.

Like the Forstmann Little/Telmex Plan, the Stand-Alone Plan involves the elimination of \$3.7 billion in unsecured debt and all existing equity, amendment of the terms of the secured facility and the issuance of new equity. According to the Motion, the principal difference is that under the Stand-Alone Plan, instead of issuing a controlling stock interest for new cash, \$500 million of the \$1 billion in existing loans under XO's secured credit facility would be converted into 95% (90,250,000 shares) of the new initial common stock of Reorganized XO. As a result of High River's prior acquisition of 84.7% of XO's obligations under the secured credit facility, High River would be issued no less than 80% of the new initial common stock of Reorganized XO (before giving effect to the exercise of rights in the rights offering described below). XO note holders and general unsecured creditors collectively would receive 5% (4,750,000 shares) of this initial common equity and would have the opportunity, along with other bankruptcy claimants, to acquire up to an additional 29.6% interest through the rights offering. Meadow Walk Limited Partnership, a Delaware limited partnership also ultimately controlled by Carl C. Icahn, holds XO notes which will entitle it to an approximate 1.4% initial equity interest in Reorganized XO. The Motion also seeks approval for the possible distribution of the stock of Reorganized XO issued to High River and Meadow Walk so that it would be held instead by Cardiff Holding LLC, a Delaware limited liability company which also is ultimately controlled by Carl C. Icahn.

Also according to the Motion, Reorganized XO will seek additional funds through a \$200 million rights offering. Pursuant to this rights offering, certain of the Company's creditors will have rights to acquire on a *pro rata* basis up to 40,000,000 shares of Reorganization Common Stock (the "Rights Shares"), after which the unexercised rights will be available to the holders of senior debt, including High River. However, even if all of these shares were issued to other parties, they would constitute only 29.6% of the common stock and High River's equity interest in Reorganized XO would not be diluted below 50%. The Stand-Alone Plan also provides for the grant of stock options to Reorganized XO management and employees, exercisable over several years, for the acquisition of up to 10% of the shares of Reorganized XO. It also provides for three series of warrants, exercisable over a seven-year period, to XO note holders and general unsecured creditors for the purchase of additional Reorganization Common Stock at a premium. Because the exercise of the options and warrants is uncertain and may occur, if at all, in the future, the impact of the possible issuance of any additional shares on the control of XO

need not be assessed here.

Half of the \$1 billion secured credit facility will be converted into equity of XO. The existing credit agreement will be amended and restated to reduce the amount to \$500 million, extend maturity dates, modify certain financial covenants, make other modifications and subordinate this credit facility so that XO may, under certain conditions, borrow up to \$200 million in a new credit facility that would be senior to the amended facility. Petitioners note that XO's subsidiary, XO New Jersey, provided its guaranty and security interest in its assets in support of the original credit facility as approved by the Board and that the proposed modifications to the facility are consistent with the Board's prior approval. See Order I/M/O the Verified Petition of NEXTLINK New Jersey Inc. to Secure and Issue Evidence of Indebtedness Pursuant to Sections 48:3-7 and 4:3-9 of the New Jersey Statutes, Docket No. TF00010011 dated March 16, 2000. Petitioners do not, at this time, seek approval for the possible additional \$200 million borrowing. This additional borrowing could be used to make up for any shortfall in the rights offering described above.

Petitioners assert that the Reorganized XO will continue to possess the managerial, technical and financial qualifications to provide, through its subsidiary, telecommunications services in New Jersey. As was the case under the Forstmann Little/Telmex Plan, High River generally plans to retain XO's current management team and will continue to rely on the experienced cadre of managers, technicians and other professionals who now operate XO's networks and provide service to the public. Further, like the Forstmann Little/Telmex Plan, this transaction does not involve any transfer of authorizations or change in carriers providing service to customers or any change in rates, terms or conditions of services. Thus, the transfer of control of XO will be transparent to customers of XO New Jersey and will not have any adverse impact upon them.

Petitioners represent that the proposed transaction will enable XO New Jersey to continue to provide high quality local, long distance and broadband service to its customer base. Conversely, without the new investment, XO financial stability would be significantly compromised. Financially, the Reorganized XO will benefit from a major reduction in its current debt load as well as potential additional funding through the rights offering or the additional \$200 million loan referred to above. Of special significance, according to Petitioners is the fact that the reorganized company is expected to have \$387 million in cash or cash equivalents available to it.

By letter dated December 2, 2002, the Division of the Ratepayer Advocate advised that it does not object to approval of the amendment to the Order.

### FINDINGS AND CONCLUSIONS

After a thorough review of the Motion and all related documents, the Board is convinced that the transfer of control to Reorganized XO, as controlled by High River or Cardiff pursuant to the Stand-Alone Plan, is in the public interest. As with the transfer under the Forstmann Little/Telmex Plan approved in the Initial Order, with regard to the provision of service, there will be no negative impact on service to New Jersey customers. All services will continue to be provided to the Petitioners' New Jersey customers without interruption and pursuant to the same tariffs, contracts, rates, terms and conditions in existence prior to the transaction. In addition, Petitioners have advised that the transactions will have no effect on New Jersey employees.

Accordingly, after careful review of this matter, the Board FINDS that the transfer of control pursuant to the Stand-Alone Plan, as described in the Motion, will have no negative impact on competition, the rates of current customers, or on employees. The Board also FINDS that the transfer pursuant to the Stand-Alone Plan will have no negative impact on the provision of safe, adequate and proper service. Therefore, the Board, after investigation, having considered the

record and exhibits submitted in this proceeding, FINDS that the transfer is in accordance with law and in the public interest. The Board HEREBY GRANTS the Motion by Petitioners to amend the Initial Order and the Board HEREBY APPROVES the transaction pursuant to the Stand Alone Plan. This Order does not constitute and is not to be construed as approval of the possible additional \$200 million borrowing referenced by Petitioners which must be the subject of a separate request for such Board Approval, as may be necessary, as such time as Petitioners determining to utilize the borrowing.

DATED: 12/5/02

BOARD OF PUBLIC UTILITIES  
BY:

(signed)  
JEANNE M. FOX  
PRESIDENT

(signed)  
FREDERICK F. BUTLER  
COMMISSIONER

(signed)  
CAROL J. MURPHY  
COMMISSIONER

(signed)  
CONNIE O. HUGHES  
COMMISSIONER

(signed)  
JACK ALTER  
COMMISSIONER

ATTEST:

(signed)  
KRISTI IZZO  
BOARD SECRETARY